

The African Union and the International Criminal Court: An Embattled Relationship?

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Introduction

The International Criminal Court (ICC) was established as a permanent, independent institution to prosecute individuals who have orchestrated and executed the most serious crimes of international concern, including war crimes, crimes against humanity and genocide. The Rome Statute, which entered into force on 1 July 2002, is explicit on the role of the Court in exercising a criminal jurisdiction over perpetrators of these crimes. African countries were actively involved in the creation of the ICC and played a crucial role at the Rome conference when the Court's statute was drafted and adopted. To date, Africa represents the largest regional grouping of countries within the ICC's Assembly of State Parties.

While African countries were initially supportive of the ICC, the relationship degenerated in 2008 when President Omar Al Bashir of Sudan was indicted by the Court. Following this move, the African Union (AU), which is representative of virtually all countries on the continent, adopted a hostile posture towards the ICC. The AU called for its member states to implement a policy of non-cooperation with the ICC – and this remains the stated position of the continental body.

This article discusses the trajectory of Africa's relationship with the ICC and offer insights into how this embattled relationship might be repaired. Without bridging these differences the ability of the Court to work actively to address impunity, which is also the stated aim of the AU, will be undermined across the African continent.

Africa and the establishment of the ICC

The establishment of the ICC was the culmination of an evolutionary trajectory of international justice that can be traced back to the Nuremberg and Tokyo trials following the Second World War. The Rome conference, which led to the signing of the Statute establishing the Court in July 1998, was a long and arduous affair of international negotiation and brinkmanship. The majority of countries represented at the Rome conference, including African countries, were of the view that it would be a positive development in global governance to operationalise an international criminal justice regime to hold accountable individuals who commit gross atrocities and violations against human rights. Specifically, the Rome Statute has jurisdiction over war crimes, crimes against humanity and genocide. The crime of aggression also falls under the rubric of the Rome Statute, and for the majority of countries there was the sense that this provision could restrain the unwarranted interventions of more powerful countries. The reality of the Rwandan genocide of 1994, also convinced many African governments of the need to support an international criminal justice regime that would confront impunity and persistence of mass human rights violations on the continent. African countries were therefore part of a wider campaign of support for the ICC.

The ICC also had its opponents. At the 1998 conference 120 voted for the final draft of the Rome Statute, but 21 abstained and 7 voted against. From its inception, 'the Court faced a strong challenge from the United States, which first signed the Statute and then "unsigned" it'.¹ The failure of powerful countries, including Russia and China, to actively support the Court and subject themselves to its criminal jurisdiction, immediately sounded alarm bells about the reach – and ultimately the efficacy – of an 'international' court whose remit would essentially be confined to the middle and weaker powers within the international system.

The Statute required 60 ratifications to come into force, and this was achieved in April 2002, paving the way for the launch of the ICC in July 2002. The African governments subsequently raised objections about the self-exclusion by powerful countries from the Rome Statute, underpinned by concerns about how the original noble intentions of the ICC have become subverted by the political expediency of great-power interests.

ICC interventions and perceptions of the ICC in Africa

Despite past and present war and conflict in other world regions, the ICC's prosecutorial interventions are currently focusing exclusively on African cases: the Democratic Republic of the Congo (DRC), Central African Republic (CAR), Sudan (Darfur), Uganda (Northern), Libya, Côte d'Ivoire and Kenya. The cases have come about as a result of a combination of self-initiated interventions by the ICC's First Chief Prosecutor, Luis Moreno Ocampo, two UN Security Council referrals, and the submission by individual African governments (specifically, CAR, DRC and Uganda) of cases to the Court. Nevertheless, the current Afro-centric focus of ICC prosecutorial interventions has created a distorted perception on the African continent about the intention behind the establishment of the Court. The reality is that African countries voluntarily signed up to be subject to the jurisdiction of the ICC, and some have therefore asked why those who share this perception now question the Court for doing its work.

By examining each African case individually one might be able to come up with a rational explanation of why all the current cases of the ICC are in Africa. One might even argue that, to a neutral observer, if one critically analyses the facts, it is impossible to reach the conclusion that the ICC was established with the sole purpose of prosecuting cases from Africa. At the same time, though, one could also identify a combination of domestic and international political interests behind the submission of, for the time being, only African cases and behind UN Security Council referrals to the ICC.

Irrespective of which prism one chooses for viewing the situation, there is a perception among several African governments that the ICC Prosecutor has been selective in

submitting cases to the Pre-Trial Chambers of the Court. The selective justice in the current ICC prosecutions is seen as an injustice towards the African continent. With war crimes being committed across the world, it appears to African governments that the ICC is only keen to pursue cases on *their* continent, where the states are comparatively weaker than the diplomatic, economic and financial might of the United States, the United Kingdom, Russia and China. This has hit a diplomatic nerve on the African continent. According to some African officials, there is an entrenched injustice in the actions of this international criminal court whose primary function is to pursue justice for victims of gross violations. Furthermore, when challenged on these points, proponents of the ICC tend to engage in highly convoluted and ultimately incoherent arguments as to why there are no cases from outside of Africa.

The moral integrity of the ICC has therefore been called into question by a number of commentators and observers in Africa, with the accusation being that cases are not being pursued on the basis of the universal demands of justice, but according to the political expediency of pursuing cases that will not cause the Court and its main financial supporters any concerns. Against this charge the ICC system and the Office of the Prosecutor have failed to make a strong case, which ultimately can only be reinforced by actions to demonstrate that this Court is for all and not for the select and marginalised few. This is the perception that the ICC has to address across the African continent. In the absence of such a dialogue, reinforced by concrete action to demonstrate otherwise, the efficacy of the Court will continue to decline across the continent.

The AU's rationale for criticising the ICC

It is often the case that individuals and leaders who have been accused of planning, financing, instigating and executing atrocities, all in the name of civil war, can be investigated by the ICC if the respective country is a State Party to the ICC or if the issue is referred to the Court by the UN Security Council. It is also often the case that these individuals and leaders are the very same people that are called upon to engage in a peace process that will lead to the signing of an agreement and ensure its implementation.²

Specifically, in the situation in Darfur, Sudan, one particular case – *The Prosecutor v. Omar Al Bashir* – proved to be controversial. The ICC Pre-Trial Chamber I has since issued an arrest warrant for Al Bashir for war crimes, crimes against humanity and genocide. Meeting shortly after the ICC's decision, the AU Peace and Security Council (PSC) issued a communiqué, PSC/PR/Comm.(CLXXV), on 5 March 2009, which lamented that this decision came at a critical juncture in the ongoing process to promote lasting peace in Sudan.³ Additionally, through that same communiqué, the PSC requested the UN Security Council to exercise its powers under Article 16 of the Rome Statute to defer the indictment and arrest of Al Bashir. The PSC subsequently expressed its regret over the UN Security Council's failure to exercise its powers of deferral and effectively postpone any ICC action. Consequently, on 3 July 2009 at the 13th Annual Summit of the Assembly of Heads of State and Government held in Sirte, Libya, the AU decided not to cooperate with the ICC in facilitating the arrest of Al Bashir, which led to souring of relations between the Union and the Court.

The AU was making the case for *sequencing* the prosecution by the ICC due to the fragile peace in Darfur, but there were undoubtedly political reasons for such a request since the arrest and arraignment of a sitting head of state in Africa could set a precedent for a significant number of other leaders on the continent, who could potentially be subject to the criminal jurisdiction of the ICC for their own actions. Therefore, rallying behind Al Bashir, who was re-elected as the President of Sudan in April 2010, could be construed not only as a face-saving exercise but also as one that seeks to prevent the ICC from having such a remit in the administration of international justice on the continent. Nevertheless, the AU made the point that Sudan finds itself at a critical juncture of its peace-making process in Darfur, and Al Bashir is the key interlocutor with the armed militia and political parties. This argument clearly cannot be wished away or ignored.

The Prosecutor of the ICC has so far received non-compliance from the Government of Sudan with regard to Al Bashir's arrest warrant and other African countries – including Djibouti, Kenya and Chad – have declined to arrest Al Bashir when he has travelled there. In this case, the prosecution is being delayed not because of the decision and discretion of the Court but

because of the non-compliance of African countries and the international community in seeing through its request.⁴

In the majority of cases in which the ICC is currently engaged, the issue of prosecuting alleged perpetrators is problematic. As noted earlier, given the tricky reality that more often than not individuals who have been subject to the jurisdiction of the Court are also key interlocutors in ongoing peace processes, the ICC is currently implicated in impacting upon the dynamics of peace-building in the countries in which prosecutions are pending or ongoing. Therefore, the ICC has the potential to disrupt in-country peace-building initiatives if its interventions are not appropriately sequenced.

On 29 and 30 January 2012, the 18th Ordinary Session of the Assembly of AU Heads of State and Government, which was held in Addis Ababa, Ethiopia, reiterated its position not to co-operate with the ICC and stipulated that all AU states had to abide by this decision and that failure to do so would invite sanctions from the Union. In particular, the decision urged 'all member states to comply with AU Assembly Decisions on the warrants of arrest issued by the ICC against President Al Bashir of Sudan'.⁵ The AU further requested its member states to ensure that the Union's request to defer the situations in Sudan, as well as Kenya, be considered by the UN Security Council.

According to a number of African governments, a court that does not apply the law universally does not justify the label of a court.⁶ This is particularly important if the jurisdiction of the court does not apply to some countries that are actively engaged and operating in African conflict zones. What would happen if a citizen of these non-signatory states to the Rome Statute were to commit war crimes in Africa? Who would administer international justice in those particular cases? Certainly, not the ICC and not the UN. This glaring discrepancy undermines the evolving international justice regime and reverses gains made on constraining the self-serving agendas of powerful countries, particularly where their relations with weaker states are concerned.

The view in Africa is that if one demands accountability for African leaders then the same justice should also be demanded of Western, Russian and Chinese leaders, particularly in situations where there is the perception that

these leaders have committed the most serious crimes of international concern.⁷ In the absence of an overarching system of global political administration or government, international criminal justice will always be subject to the political whims of individual nation states.

The AU has argued that the Rome Statute cannot override the immunity of state officials whose countries are not members of the Assembly of State Parties. The AU intends to seek an advisory opinion from the International Court of Justice on the immunities of state officials within the rubric of international law.

Diverging African opinions on the ICC

Following the January 2012 summit at which the AU Heads of State and Government set out their position of non-cooperation with the ICC and demanded that all AU states fall in line or risk sanctions by the Union, some African countries have expressed reservations. Botswana publicly disagreed with the AU's decision not to co-operate with the ICC, stating its international obligations under the Rome Statute. South Africa has also reiterated its commitment to upholding its legal obligations as a State Party to the Rome Statute. However, while Botswana has been emphatic and unwavering in its support for the ICC's actions, South Africa has played a more nuanced diplomatic game due to its key role within the AU.

In January 2012, South Africa sought the appointment of Nkosazana Dlamini-Zuma, its former Foreign Minister, as the Chairperson of the AU Commission, indicating its desire to play a more assertive role within the Union. At the July 2012 AU summit in Addis Ababa, Dlamini-Zuma was ultimately victorious, with 37 member states voting for her as the new Chairperson of the Union's Commission. Given its stated position of upholding its international commitment to the Rome Statute, South Africa has adopted a cautious approach towards dealing directly with or raising the profile of the issue of the ICC prosecutions. South Africa is thus in a rather invidious position when it comes to the AU-ICC relationship. Indications are that South Africa will most likely side with the AU rather than pursuing the ICC's agendas on its behalf across the continent. This ultimately does not augur well for the ICC, given South Africa's important regional role.

The Second Chief Prosecutor and the prospects for the AU–ICC relationship

First Chief Prosecutor Ocampo was emphatic that he did not ‘play politics’, but to many commentators and observers it seemed all too obvious that he was enthusiastic in initiating prosecutions for African cases, while not even undertaking preliminary investigations into alleged war crimes in Gaza, Sri Lanka or Chechnya due, it is assumed, to the politically sensitive nature of such actions. The Office of The Prosecutor (OTP) has conducted *preliminary* investigations in Afghanistan, Georgia, Colombia, Honduras, Korea and Nigeria. However, under Ocampo these preliminary investigations took on an air of permanency. ‘Permanent preliminary investigations’ could be said to be essentially a way of using technicalities to indefinitely avoid launching prosecutions.

This discrepancy in Ocampo’s behaviour and attitude towards African and non-African war crime situations was not lost on African leaders. In fact it was key in fuelling allegations that the ICC Prosecutor was implementing a thinly veiled pro-Western agenda, despite his emphatic denials. In the final analysis, critical scholars like Adam Branch have argued that there is no valid reason why Ocampo could not have instigated prosecutions in other, non-African countries during his tenure.⁸ As a consequence, Ocampo’s version of the ICC is viewed with suspicion by some actors in Africa.

Moreover, Ocampo’s selection of four individuals as the people most responsible for instigating and perpetuating the most serious crimes of international concern during Kenya’s post-electoral violence, in 2007 and 2008, has now become a central feature of the campaigning for presidential elections in 2013. Political opponents in Kenya have now completely politicised the ICC indictments of Uhuru Kenyatta, the Deputy Prime Minister; William Ruto, a former cabinet minister; the Chief Secretary to the Ministerial Cabinet and Head of the Civil Service, Francis Muthaura; and Joshua Arap Sang, a radio personality. The image of the ICC in Kenya among certain sectors of the Kenyan population is that it is a useful tool for political opportunists to use to dispose of their opponents prior to the presidential election.

Ocampo is now the former ICC Prosecutor. In December 2011, the Assembly of State Parties appointed Fatou Bensouda, former Attorney

General and Minister of Justice of Gambia, as the consensus choice to succeed Ocampo. Bensouda was a key member of the Ocampo team, as the Deputy Prosecutor in charge of the ICC Prosecutions Division, and it is unlikely that she will digress significantly from the parameters stipulated in the Rome Statute. It is widely recognised that the Second Chief ICC Prosecutor has not yet demonstrated a desire to apply the same remit of justice as has been applied to African cases to cases in Chechnya, Iraq and Afghanistan because this would be politically difficult. In addition, the UN Security Council has not referred the crisis situation in Syria – which has escalated over the past year with potential war crimes being committed – to the ICC. The reason for the UN Security Council’s inaction in Syria, compared to its interventions in Darfur and Libya, is that Russia and China, who are patrons of the Syrian regime in Damascus, would veto any UN Security Council resolution referring the situation in the country to the Court.

The appointment of Bensouda as Prosecutor was a move calculated to appease the African members of the Assembly of State Parties. By appointing an African, and former Minister of Justice of Gambia, the Assembly is communicating the fact that it does not view the Court as advancing an anti-African agenda. An African at the helm of the prosecutorial arm of the Court will supposedly dispel any suspicions that the ICC is a neo-colonial instrument to discipline the untamed and still-barbaric African landscape.

Yet Bensouda has a mammoth task ahead of her. Not only must she attempt to mend the trust that has been broken between the AU and the ICC. She must also urgently intervene in the volatile situation in pre-election Kenya, which needs to be carefully managed. Given the fact that the Statute of Limitations provisions within the Rome Statute are indefinite, Bensouda could use her prerogative to extract the ICC from this incendiary political situation in Kenya and only pursue the prosecutions after the heated controversy around the role of the Court in excluding candidates has simmered down.

Even though the ICC has stipulated that the Kenya prosecutorial proceedings will only begin in April 2013, this has only marginally reduced the saliency of the Court’s role in the presidential poll.

More generally, though, Bensouda will need to initiate dialogue with the AU leadership. She will

have to move swiftly to distance herself from the confrontational stance that developed between the ICC and the AU during the Ocampo regime. She will need to communicate directly to African constituencies, governments and civil society and use them to convey the message behind the objective and mandate of the Court.

On Darfur, Bensouda's hands are effectively tied by the stand-off between the AU and the UN Security Council. The latter has, to date, declined to issue a formal communication to the AU on its request for the Al Bashir indictment to be deferred. Some members of the UN Security Council have informally stated that the AU should in effect take a 'hint' and consider the Council's 'silence' as a form of communication. Such dismissive attitudes do not augur well for a mutually acceptable resolution of the impasse between the AU and the UN Security Council, which in effect also drags in the ICC and makes it appear complicit in not responding to the AU's request. An initial indication that Bensouda is making progress in opening dialogue with the AU will be the full operationalisation of an ICC office in Addis Ababa, the headquarters of the AU, to serve as an urgently required liaison office and means for the Court to regularly engage the Union as an interlocutor in its own backyard.

The AU and the future of international criminal justice in Africa

The AU constantly 'reiterates its commitment to fight impunity in conformity with the provisions of Article 4(h) of the Constitutive Act of the AU'.⁹ According to officials of the AU, what the body takes exception to is in effect being constrained by how other international actors choose to fight impunity on the African continent. In a statement shortly after she was sworn in as the Chairperson of the AU Commission, Nkosazana Dlamini-Zuma stated that 'the AU had applied its mind and decided that it is more important to get peace in Sudan than to rush for the arrest, and therefore they ask for it to be deferred; as far as I know, that decision still stands'.¹⁰ This sentiment is not unique to Africa. There is no other region of the world that is subject to the prosecutorial interventions of the ICC, so it is not possible to compare or contrast whether the AU's stance is in fact unreasonable. All inter-governmental organisations undoubtedly would want to determine how their member states engage with issues relating to transitional justice, peace-

building, democratic governance and the rule of law, without feeling that there is an overbearing and patriarchal entity in effect stipulating how the continent should be going about doing so.

It is an understatement to note that the relationship between the AU and the ICC has got off to a bad start. One could not imagine a worse start. Both organisations share a convergence of mandates to address impunity and to ensure accountability for violations, atrocities and harm done in the past. Where the organisations diverge is in the fact that the AU is a political organisation and the ICC is an international judicial organisation. In this divergence lies how the two organisations go about 'addressing impunity and ensuring accountability for past violations, atrocities and harm done'.

The AU, by its very nature, will gravitate first to a political solution and approach to dealing with the past; such an approach will place more of an emphasis on peace-making and political reconciliation. The ICC, on the other hand, will pursue international prosecutions, because this is written into its DNA, the Rome Statute. On paper it would appear that the two approaches may never converge. Yet there is scope for the AU to become more nuanced in the situations in which it would side with and support ICC interventions to promote accountability for past violations. Conversely, the ICC has to acknowledge and communicate that it is aware that it is operating in an international political milieu – and that on occasion it would have to sequence its prosecutions to enable political reconciliation processes to run their course. This would require the ICC to step down from the artificial pedestal on which Ocampo placed it, asserting that it does not play politics – when in fact it has appeared that everything that it has done has been politically tainted. In effect, the ICC will need to embrace the political lessons of its past transgressions and omissions, and openly acknowledge that, in the absence of a world government, it works in an inherently unrestrained international political system. Bensouda and her team will need to reframe the ICC's orientation in this regard. This will not require re-opening the Rome Statute to further engineering and potential dismemberment. Bensouda can communicate her intentions by issuing OTP Policy Papers on how the ICC will sequence its activities to enable peace processes to take their course and how her administration intends to go about rectifying and

remedying the misperceptions that persist across Africa.

There could potentially be cases in the future in which the AU would countenance allowing the ICC to do what it was designed to do – with the proviso that given the nature of the Union as a political organisation, its leadership would be reluctant to expose its membership to a precedent in which one of its ranks is prosecuted by the ICC. This is, of course, an unpalatable prospect for human rights activists and advocates of the utility of prosecuting those who commit egregious atrocities; specifically because this would be in contravention of the principles of human rights, which would have to be sacrificed on the altar of political pragmatism. There is clearly merit in the position of the human rights organisations.

In effect, both the AU and the ICC would need to reorient their stances. The AU would need to move away from its exclusively political posture, towards embracing international jurisprudence and limited interventions by the ICC. By the same token, the ICC would need to move away from its unilateral prosecutorial fundamentalism and recognise that there might be a need to sequence its interventions to give political reconciliation an opportunity to stabilise a country.

Such a strategy for repairing the embattled relationship between the AU and the ICC would inevitably be seen by some actors on both sides as an unacceptable compromise, and their preference would be for their organisations to stick to their guns. In fact, such a scenario is already playing itself out. The AU is undertaking a study to assess how its continental institution, the African Court of Justice and Human Rights, can be imbued with continental jurisdiction for war crimes, crimes against humanity and genocide. The idea behind this move is essentially to establish a Pan-African criminal court with the same mandate as the ICC, thereby seeking to circumvent all future ICC interventions on the African continent. Whether this would lead to African State Parties withdrawing from the Rome Statute is not yet clear. Furthermore, while the Rome Statute makes provisions for complementarity with national jurisdictions, it does not have similar provisions for continental jurisdictions, so there is no guarantee that a Pan-African criminal court would be recognised by the ICC.

Whether the AU succeeds in establishing a continental jurisdiction is beside the point. The key issue is that the continental body views its relationship with the ICC as having deteriorated to such a point that the Union is actively exploring how to make the Court's presence in Africa an irrelevancy in the future. International organisations like the League of Nations ceased to exist when their members effectively ignored their mandates. Will the ICC suffer the same fate in Africa? Only time will tell, but the situation compels us to acknowledge that there is an urgent case to be made for repairing the embattled relationship between the AU and the ICC.

African civil society and the ICC

The view of African civil society with regard to the role of the ICC on the continent is not a homogeneous one. There are several schools of thought among civil society and the wider public. There are those who view the ICC as a necessary palliative to the gross impunity that has wreaked havoc on the lives of African citizens. There is also the critical view, among some civil society actors, that the ICC is not a panacea that will cure Africa of all its ills and rid it of its criminal elite. The pro-ICC civil society camp views the Court as confronting and subverting attempts by African leaders and governments to circumvent accountability for past atrocities; it argues that the domestic legal systems are unable to deal, or are incapable of dealing, with the most serious crimes of international concern, and therefore the Rome Statute's jurisdiction has to be operationalised. By contrast, the ICC-sceptics question whether justice meted out in The Hague will ultimately bring about any genuine change on the ground if there is no political will to do so. The ICC ruling on Thomas Lubanga, on 14 March 2012, is a case in point. In what was the Court's first ever ruling, the leader of the Eastern DRC militia was convicted by the ICC for war crimes relating to conscripting children under the age of 15 years into his rebel army. However, the import or relevance of the ICC's ruling seems to have escaped the militia in the DRC, whose murderous activities have continued unabated. Towards the end of 2012, the armed militia dubbed M23 escalated its violent acts in the region and briefly occupied Goma in Eastern DRC. Therefore, the argument that ICC prosecutions will bring about change on the ground and 'put an end to impunity', as boldly stated by the Preamble of

the Rome Statute, will begin to ring hollow to the victims on the ground, unless a credible political process accompanies the prosecutorial strategy.

The ICC-sceptics argue that even though African legal systems may not be able to live up to some illusionary 'international standard of the administration of justice', there is no reason to sub-contract the judicial process to a remote and aloof court in The Hague. They further argue that the ICC's exclusive focus on African cases during its first ten years of operation is tantamount to judicial imperialism and a neo-colonial encroachment into national jurisdictions.

On 26 January 2011, approximately 30 civil society organisations from about 20 African countries wrote collectively to African members of the ICC Assembly of State Parties urging them to support the Court. Even though these civil society initiatives are receiving scant attention from the AU and the majority of African states, they can contribute towards encouraging a more constructive dialogue between the Union and the Court. Ultimately, the matter will be resolved at the level of governments, due to the state-centric nature of international relations.

Policy recommendations

To the ICC:

- The ICC needs to reorient its stance towards the AU.
- The ICC needs to improve its outreach and active engagement with African civil society, both through meetings across the African continent and by adopting a more welcoming and accommodating approach to representatives when they come to engage with the ICC in The Hague.
- The Second Chief Prosecutor needs to appoint a senior political advisor to fulfil a liaison role with political organisations like the AU. This might assist with efforts to accredit the ICC to the AU headquarters in Addis Ababa.
- The Second Chief Prosecutor should issue an OTP Policy Paper on sequencing the administration of justice to enable the promotion of peacebuilding, particularly in countries that are still war-affected.

To the African Union:

- The AU needs to reorient its stance towards the ICC. There will be instances in which the ICC can function as a partner to the AU in terms of addressing the violation of human rights on the continent.
- The AU should enter into a dialogue with the ICC and utilise the presence of African countries in the ICC Assembly of State Parties to further communicate its views to the Court system.

To the UN Security Council:

- The UN Security Council needs to acknowledge that it also has an important role to play, to communicate formally with the AU on issues that the Council has raised relating to Sudan and Kenya. A policy of silence will only foment confusion and misunderstanding.

To civil society:

- African civil society should continue to play an important role in undertaking policy analysis, victim support, documentation, awareness raising, advocacy and lobbying aimed at African governments on issues relating to international criminal justice.
- African civil society should also adopt a balanced view when analysing the impact of the ICC's interventions on peace-building processes on the continent. This will require adopting a posture of constructive criticism towards the ICC.

Conclusion

The ICC is a court of last resort and not a court of first instance. Ideally, national criminal jurisdiction should take precedence in efforts to address impunity. While the Preamble of the Rome Statute recognises "that such grave crimes threaten the peace, security and well-being of the world"¹¹ it does not further elaborate how the Court will contribute towards advancing 'peace' in the broader sense, beyond ensuring that the perpetrators of these crimes are punished. In Africa, the activities of the ICC have focused on exercising its criminal jurisdiction without

engaging in the broader issue of how its actions contribute towards consolidating peace.

The ICC's relationship with Africa – and in particular with the AU – deteriorated following the arrest warrant issued for President Al Bashir of Sudan, based on a UN Security Council referral to the Court. The AU's policy of non-cooperation with the ICC is undermining prospects for the development of international justice, particularly on the African continent. The refusal by some countries to place themselves under the jurisdiction of the Rome Statute means, according to African governments, that the ICC will fall short of being a genuinely international court. Some African governments view this limited and restricted mandate as undermining the principles of international justice. Furthermore, the zeal of the First Chief ICC Prosecutor to pursue justice in Africa, against his failure to do so in Afghanistan, Chechnya, Gaza, Iraq and Sri Lanka, caused African countries to accuse the ICC of selectivity in the administration of international justice: a case of one law for the powerful and another for the weak.

There is an urgent need to reorient the AU and ICC relationship. Both organisations need to recognise that while they are fulfilling different functions – delivering international justice, in the case of the ICC, and looking out for the political interests of African governments, in the case of the AU – they need to find a way to ensure that the administration of justice complements efforts to promote political reconciliation.

In addition, the UN Security Council has to become part of the solution to reorienting the relationship between the AU and the ICC. The referral power of the UN Security Council implicates the Council directly into the existing crisis situation between the AU and the ICC. It would therefore be a dereliction of the UN Security Council's responsibility, for contributing to the embattled relationship between the AU and ICC, not to contribute towards improving dialogue and understanding between the two institutions. Failure to address this tension means that the politics of international criminal justice will continue to be viewed with suspicion from an African perspective.

Notes

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- 10 South African Broadcasting Corporation. Interview with Nkosazana Dlamini-Zuma, Chairperson of the African Union Commission, 1 August 2012, South Africa.
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